Supreme Court, U.S.
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No. 91-1474

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

NICHOLAS G. FARRINGTON,
Petitioner,

v.

THE BUREAU OF NATIONAL AFFAIRS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

1. Was Petitioner's defamation claim against his employer precluded by the common law defense of consent where the alleged defamatory statements are contained in an evaluation of Petitioner's job performance that his employer was contractually obligated to provide, where the statements at issue were relevant to an evaluation of his performance, and where the evaluation was issued only to those with a legitimate interest in the subject matter?

2. Is Petitioner entitled to relief from summary judgment on the ground that he was not notified by the trial court of his obligation to file affidavits where there is no rule requiring the trial court to give such notice and where the trial court did not base its award of summary judgment on Petitioner's failure to file affidavits?

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STATEMENT OF THE CASE

This is a defamation suit by an employee against his employer and former supervisors challenging a written performance evaluation with which the employee does not agree. Petitioner works for Respondent, The Bureau of National Affairs, Inc. (BNA), as a proofreader. In 1987 he was promoted to the job of reference file editor. Under the terms of the collective bargaining agreement between BNA and the Washington-Baltimore Newspaper Guild (the authorized bargaining representative for most BNA employees, including Petitioner), he began his reference file editor job in probationary status. The collective bargaining agreement required BNA to evaluate Petitioner's performance during each month of the three month probationary period and, in the event he did not pass proba-

tion, to perform a final evaluation stating the reasons why.[1]

Petitioner's supervisor, Respondent Valeria Bowman, concluded at the end of the probationary period that Petitioner had not performed his new job well enough to pass probation. As required by the collective bargaining agreement, she recorded her opinion in a written performance evaluation. That evaluation contained the following statements that Petitioner claims are defamatory:

> Nicholas' work did not improve to the necessary level of accuracy. Further, his work continued to reflect an inability to pick up less extensive but important changes and he also was not careful in crossing out for revision only the language affected. Since these essential skills were not mastered, he did not pass probation.
>
> Nick did not pass probation because of inaccuracies in mark-ups that he was not able to overcome, thus making his work unreliable.

This evaluation was signed by Bowman's immediate supervisor, Respondent Patricia Westlein. It was then sent to BNA's personnel office and placed in Petitioner's personnel file. Publication of the evaluation was limited to BNA's personnel office and, once he filed a grievance, its labor relations office and the union representatives pursuing his grievance.

Petitioner then filed this *pro se* defamation action in the Superior Court of the District of Columbia. Respondents moved for summary judgment on a number of theories. The only theory reached by the Superior Court was Respondent's argument that the alleged defamatory statements were absolutely privileged because Petitioner

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[1] Petitioner knew when he accepted his promotion that it entailed being evaluated in this manner. He had been promoted on two prior occasions and on both occasions had received unfavorable evaluations during probation.

consented to being evaluated by his supervisors when he accepted his promotion. The Superior Court granted summary judgment on that basis. It concluded that under *Kraft v. W. Alanson White Psychiatric Foundation*, 498 A.2d 1145, 1150 (D.C. 1985), the statements contained in the performance evaluation were privileged because Petitioner consented to an evaluation of his work, because the statements at issue were all directly relevant to his ability to perform in the probationary position, and because the publication was limited to persons with a legitimate business interest in the subject matter of the statements.

In support of their summary judgment motion, Respondents filed certain affidavits. Petitioner did not file counter affidavits. The Superior Court, consistent with local rules and local practice, did not send any notice to Petitioner explaining the role of affidavits in summary judgment proceedings.

Petitioner moved for relief from summary judgment based in part on the theory that, as a *pro se* litigant, he should have received an explanation from the court regarding the importance of affidavits. However, Petitioner did not support his motion with any proffer as to what evidence he could have produced through affidavits that would have created a genuine material issue to be tried. In fact, Petitioner had admitted all of the facts upon which summary judgment was based during his deposition.[2] The Superior Court denied Petitioner's Motion for Relief from Summary Judgment.

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[2] Petitioner admitted that BNA was required by the collective bargaining agreement to evaluate his performance, that the attributes discussed in his evaluation—accuracy and attention to detail—were necessary to successful performance of his job, and that he had no knowledge of anyone seeing his evaluation other than labor relations personnel and people involved in processing his grievance over the evaluation. Later, by operation of District of Columbia Superior Court Rule 12-I(K), he again admitted these facts when he failed to deny them in his Statement of Material Facts in Dispute.

Petitioner appealed both the initial summary judgment award and the denial of his Motion for Relief from Summary Judgment. The District of Columbia Court of Appeals affirmed both rulings. It agreed with the Superior Court's ruling on the substantive defamation issue. It did not reach the issue of whether the Superior Court should have sent Petitioner a notice explaining the need for affidavits because Petitioner did not proffer any disputed material issue of fact he could have raised through affidavits. None of the rulings in this case, whether by the Superior Court or the Court of Appeals, addressed any issue of constitutional or federal statutory law.

ARGUMENT

There are no special or important reasons why the Court should review this case. The case presents no issue of federal law. The federal question that Petitioner asserts exists was neither raised nor decided below. In addition, there is no conflict of authority here. To BNA's knowledge, no court has held that an employee may maintain a defamation action over performance related statements contained in a performance evaluation the employer was contractually required to issue. In any event, the decision below correctly resolved the common law defamation issues in the case.

I. THIS CASE PRESENTS NO FEDERAL QUESTION

Rule 10 of this Court suggests that, ordinarily, a writ of certiorari will be granted in the case of a decision by a state court of last resort only when the state court has decided a federal question. Here, the District of Columbia Court of Appeals decided no federal question. Instead, it simply decided an issue concerning the local law of defamation. Accordingly, no review of the decision below is appropriate.

Petitioner contends that there is a federal question in this case, namely "does malicious libel enjoy constitutional protection in the form of an absolute privilege for

an employer when an employee has consented to an evaluation of his job performance. . . ." (Petition at 18). However, the District of Columbia Court of Appeals did not decide that question. It merely decided that Petitioner's defamation claim was "precluded by the defense of consent which rendered the publication that occurred privileged under the circumstances of this case." (Opinion at 2). Thus, the decision turned on an analysis of the nature of the defense of consent in defamation cases, not on the question of what constitutional protection the speech in question might enjoy. BNA never raised the Constitution as part of its defense, and neither the trial court nor the Court of Appeals discussed the Constitution or any federal statute. The fact that Petitioner cited Supreme Court cases to both courts does nothing to advance his apparent claim that the Court of Appeals decided a federal question.

The other issue raised by Petitioner—whether *pro se* litigants faced with a summary judgment motion are entitled to a warning from the trial court about the consequences of not filing affidavits—likewise raises no federal question. The question of what notice, if any, must be sent to *pro se* litigants by state courts is governed by the local rules or practice of the court in question.

II. THERE IS NO CONFLICT OF AUTHORITY

Under Rule 10 of this Court one consideration in determining whether a petition for certiorari should be granted is whether the decision conflicts with the decision of another state court of last resort, a United States court of appeals, or an applicable decision of this Court. Here there is no such conflict.

To the best of BNA's knowledge, no court has ever held that an employee may sue his employer for defamation over statements contained in a performance evaluation the employer was contractually required to issue where the statements contained in the evaluation are directly relevant to employee's ability to perform and

where publication is limited to persons with a legitimate business interest in seeing the statements. None of the cases relied on by Petitioner so holds.[3] Similarly, Petitioner points to no case which holds that a non incarcerated *pro se* litigant is entitled to an explanation of the need for affidavits in opposing summary judgment. Moreover, even if Petitioner could point to such a case, this would prove only that the District of Columbia Superior Court has a different practice than the court cited. There would still be no need for this Court to become involved.

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[3] *Rogozinski v. Airstream by Angell*, 377 A.2d 807, 817 (N.J. Super. 1977), involved a response to a request for information from the Unemployment Compensation office. The Court found that the employee's implied consent was limited to a statement by the employer of the reasons for the employee's separation. The *Cary* case cited at page 29 of the Petition apparently is simply a jury verdict with no opinion by the court about the scope of the defense of consent in the context of an employee performance appraisal. *Luttrell v. United Telephone System, Inc.*, 683 P.2d 1292 (Kan. App. 1984), *aff'd* 693 P.2d 1279 (Kan. 1985), holds that intracorporate communications are publications for purposes of defamation law and suggests that alleged oral statements about the misconduct of an employee state a claim of defamation. *Krasinski v. United Parcel Service*, 530 N.E.2d 468, 471 (Ill. 1988), also involved statements made by agents of the employer during an investigation of employee misconduct. Neither Luttrell nor *Krasinski* reached the issue of what type of privilege obtains in the case of employee evaluations made pursuant to a collective bargaining agreement. *Mandelblatt v. Perelman*, 683 F.Supp. 379, 383-84 (S.D.N.Y. 1988), holds that an employee cannot sue on the basis of statements in a termination notice because he had bargained for the right to receive such documents and had every reason to expect that the notice would contain unfavorable views. Thus, *Mandelblatt* supports the ruling below. *Exxon Corp. v. Schoene*, 508 A.2d 142 (Md. App. 1986), holds that an absolute privilege does not apply where a former employee is accused in a public restaurant of stealing by his employer. *McDermott v. Hughley*, 561 A.2d 1038 (Md. 1989), holds that an absolute privilege does not apply under a consent theory where a psychologist tells an employee he will issue a report about him to an employer which will contain specific favorable findings, the employee agrees to the issuance of that report, and the psychologist then issues a report which contains findings that contradict those he promised to give.

III. THE DECISION BELOW IS CONSISTENT WITH FUNDAMENTAL PRINCIPLES OF DEFAMATION LAW AND WITH A PROPER BALANCING OF THE RELEVANT SOCIETAL INTERESTS

Even if this Court were inclined to review a local court's interpretation of the law of defamation, there would be no reason to review the unexceptional interpretation rendered by the court below in this case. Petitioner argues that the ruling below must be overturned so that employees in the District of Columbia will not be left defenseless against employers who wish to lie about them in performance evaluations. In fact, however, employees in the District of Columbia have substantial protection from being injured by defamation in the evaluation process. They are protected from defamatory statements that are not relevant to an evaluation of their performance and from the publication of the evaluation to individuals who lack a legitimate interest in seeing it. Thus, they are protected from gratuitous statements and gratuitous publication.[4]

Moreover, employees have a built in protection against bad faith in the evaluation process: supervisors have no incentive to give unfavorable evaluations to employees they honestly believe are good employees. If employees or their bargaining representatives feel that this protection is not enough, they can bargain for the right to challenge evaluations they feel are in bad faith.

This Court should not replace the sensible approach described above with one in which the privilege for statements contained in contractually mandated performance evaluations is qualified by a requirement that the evaluations be made in good faith. Under such a regime, em-

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[4] Respondents emphasize that in this case BNA did not have the option of saying nothing about Petitioner's performance. When an employer has that option, the law in the District of Columbia is that, absent express employee consent, only a qualified privilege protects the employer's statements. This constitutes additional protection against gratuitous bad mouthing of employees.

ployers would confront the choice of either saying nothing in evaluations that could offend an employee, thereby rendering the evaluation process meaningless, or regularly litigating over evaluations with unhappy employees. Many employers would opt for abandoning meaningful employee evaluation. For the remainder, the District of Columbia courts would become an employee evaluation review board.

Finally, the rule applied by the court in this case is fully consistent with accepted principles of defamation law. Petitioner relies on the Restatement (Second) of Torts for the view that his consent to being evaluated was limited to consent to a "fair and honest" evaluation. However, this case is substantially the same as the second illustration of § 583 of the Restatement. There, a discharged employee asks for publication of the reasons for his discharge. According to the Restatement, the employee has consented to the publication of whatever the employer has to say about the matter.

Here, Petitioner, through his union, asked the Respondents for a statement of the reason for his failure of probation. He consented to whatever statements the Respondents made on the subject as long as those statements were relevant to performance and not excessively published.[5]

IV. PETITIONER'S MOTION FOR RELIEF FROM SUMMARY JUDGMENT WAS PROPERLY DENIED

As the Court of Appeals held, Petitioner's contentions regarding lack of notice about the consequences of failure to file affidavits are baseless because he did not

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[5] As the Court of Appeals below explained, Petitioner's argument boils down to the proposition that he consented only to a truthful evaluation of his performance. However, "to conclude that [Petitioner] consented only to the publication of true statements about his work would render the defense of consent meaningless in this case [since] truth is a complete defense to a claim of defamation without regard to whether the one defamed consented to the publication of those statements." (Opinion at 4).

proffer any disputed material issue of fact that would have been raised in an affidavit had he received such notice. (Opinion at 6, n.3). Indeed, as noted above, Petitioner admitted at his deposition the handful of facts underlying the award of summary judgment. An affidavit attempting to repudiate Petitioner's prior sworn testimony on any of these points would have been entitled to no weight. *See e.g., Bryant v. Western Electric Co., Inc.*, 572 F.2d 1087, 1088 (5th Cir. 1978).

CONCLUSION

For the foregoing reasons, Respondents request that the petition for certiorari in this case be denied.

Respectfully submitted,

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APPENDIX

PARENT COMPANIES AND SUBSIDIARIES OF RESPONDENT THE BUREAU OF NATIONAL AFFAIRS, INC.

The McArdle Printing Company, Inc. (Subsidiary)

Pike & Fischer, Inc. (Subsidiary)

BNA Washington, Inc. (Subsidiary)

BNA International, Inc. (Subsidiary)

Tax Management, Inc. (Subsidiary)